UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE PRINCERIDGE GROUP LLC, Plaintiff, -against- OPPIDAN, INC., Defendant.	Index No.: 11-CV-1460(AJN)

MEMORANDUM OF LAW IN OPPOSITON TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER LLP
Attorneys for the Defendant

Of Counsel:

Anastasios P. Tonorezos
Jean Claude Mazzola

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT... 1

STATEMENT OF FACTS 2

ARGUMENT 3

A. In Order to Sustain a Cause of Action for Breach of Contract a Plaintiff Must prove That an Enforceable Contract Existed. 4

B. In Order to Sustain a Cause of Action for Breach of Contract a Plaintiff Must Prove That It Performed What It was Obligated to do Under the Terms of the Contract 11

i. Plaintiff acknowledges a pre-existing relationship between Oppidan and the eventual purchaser of the Properties. 11

ii. PrinceRidge did not perform its obligations under the Contract 13

CONCLUSION 15

TABLE OF AUTHORITIES

CASES

American Property Consultants, Ltd. v. Walden Lisle Associates LP,
95 Civ. 329 (KMW), 1997 U.S. Dist. LEXIS 9984 (S.D.N.Y. 1997) 9

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) 3

Baker v. Home Depot,
445 F.3d 541 (2nd Cir. 2006) 4

Banco Espirito Santo de Investimento, S.A. v. Citibank, N.A.,
No. 03 Civ. 1537, 2003 U.S. Dist. LEXIS 23062 at *9-10 (S.D.N.Y. 2003) 5

Berman v. Sugo LLC,
580 F. Supp. 2d 191 (S.D.N.Y. 2008) 11

Bice v. Robb,
2013 U.S. App. LEXIS 3055 (2nd Cir. 2013) 5

Celotex Corp. v. Catrett,
477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) 4

Cherry v. Alderman,
08 CV 4035(LB), 2011 U.S. Dist. LEXIS 146468 *13-14 (E.D.N.Y. 2011) 3

Doninger v. Niehoff,
642 F.3d 334 (2nd Cir. 2011) 3

Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y.,
375 F.3d 168 (2nd Cir. 2004) 5

Fredericks v. Chemipal, Ltd.,
06 Civ. 966 (GEL), 2007 U.S. Dist. LEXIS 49185 *3 (S.D.N.Y. 2007) 12

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,
475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) 4

McCarthy v. Dun & Bradstreet Corp.,
482 F.3d 184 (2d Cir. 2007) 4

Merrick Gables Ass'n v. Town of Hempstead,
691 F. Supp. 2d 355 (E.D.N.Y. 2010) 5

Pinto v. Allstate Ins. Co.,
221 F.3d 394 (2nd Cir. 2000) 4

Roberts v. Karimi,
251 F.3d 404 (2nd Cir. 2001) 5, 12

Train v. Ardshiel Associates, Inc.,
635 F. Supp. 274 (S.D.N.Y. 1986) 8

STATE COURT CASES

151 West Associates v. Printsiples Fabric Corp.,
61 N.Y.2d 732, 460 N.E.2d 1344, 472 N.Y.S.2d 909 (1984) 12

Futersak v. Perl,
84 A.D.3d 1309, 923 N.Y.S.2d 728, 2011 NY Slip Op 4629 (2nd Dept. 2011)........................6

Minichiello v. Royal Business Funds Corp.,
18 N.Y.2d 521, 524 (N.Y. 1966)...8

NFS Servs., Inc. v. West 73rd St. Assoc.,
102 A.D.2d 388, 477 N.Y.S.2d 135 (1st Dep't 1984) 9

Northeast Gen. Corp. v. Wellington Advertising,
82 N.Y.2d 158 (N.Y. 1993)...7

Panarello v. Vinchiarello,
6 A.D.3d 515, 775 N.Y.S.2d 360 (2nd Dept. 2004)..9

Polo v. Lordi
261 N.Y. 221 (N.Y. 1933)..8

STATUTES

N.Y. Real Prop. Law §440. 9

N.Y. Real Prop. Law § 442-d 6, 9

N.Y. Town Law § 64(6)..5

RULES AND REGULATIONS

Fed. R. Civ. P. 56(a) 3

OTHER AUTHORITIES

Bendell
251 N.Y. at 308-09 9

PRELIMINARY STATEMENT

Real Property Law § 442-d provides, in pertinent part, that "[n]o person . . . shall bring or maintain an action in any court of this state for the recovery of compensation for services rendered . . . in the buying, selling, exchanging, leasing, renting or negotiating a loan upon any real estate without alleging and proving that such person was a duly licensed real estate broker or real estate salesman on the date when the cause of action arose." Real Property Law § 442-d. Recognizing that the law is uniform, unambiguous and applicable to the facts of this case, Plaintiff takes a proactive method by filing the instant motion for summary judgment in lieu of attempting to oppose Defendant's motion for summary judgment that is based upon the aforementioned law and supported by the undisputed facts of this case. It is respectfully suggested that, in light of the overwhelming law dictating dismissal of the Complaint, Plaintiff's motion, including the thirteen pages of "facts", is an attempt to divert attention. Indeed, the motion provides little in support of the relief sought but instead highlights superfluous information relating to the purchase price of the properties (in bold) and talk of Oppidan's care when dealing with New York Brokers.

PrinceRidge does not address the fact that it did not fulfill the terms of its engagement, and glances over the most crucial aspect of its flawed claim – PrinceRidge is not and was not a licensed real estate broker. It is black letter law in New York, supported by every court addressing the issue and ordered by the legislature: PrinceRidge cannot recover compensation for services rendered in the buying, selling, exchanging, leasing, renting, assisting or negotiating of real estate without alleging and proving that PrinceRidge was a duly licensed real estate broker or real estate salesman on the date when the alleged cause of action arose.

Plaintiff instead focuses upon a central theme that it "introduced" Oppidan to National Retail Properties ("NRP"). While PrinceRidge acknowledges that Oppidan had a "pre-existing relationship" with NRP, it unilaterally deems that to be immaterial. Plaintiff's claim is that it is entitled to recovery for introducing Oppidan to NRP, so Plaintiff's casual dismissal of that undisputed fact is noteworthy. Since Oppidan had previous and ongoing communications with NRP (the eventual buyer of the properties at issue), Plaintiff realizes that addressing the purported "introduction" substantively would at a minimum raise questions of fact that would preclude summary judgment for Plaintiff. Although PrinceRidge does not dispute the prior relationship, Plaintiff avoids that the record unequivocally establishes that Oppidan communicated with NRP – and a real estate broker employed by NRP – about buying properties as early as 2007, three years prior to Oppidan's contract with Plaintiff.

Instead, the strategy is to paint Oppidan in a negative light as a party that left Plaintiff high and dry. But that is not what the facts show. Plaintiff did not earn its fee as Plaintiff did not perform in accordance with the terms of the Contract. Plaintiff should not receive a commission for making an "introduction" to a company with whom Oppidan already had a long standing relationship. Underlying the foregoing, there remains the undisputed legal standard as well as the undisputed facts in support of dismissal, that Plaintiff cannot sustain a viable claim against Defendant.

Based upon the applicable law, Plaintiff's Complaint is subject to dismissal, and summary judgment in favor of Plaintiff must be denied.

STATEMENT OF FACTS

The Court is respectfully referred to the Defendant's attached Response and Counterstatement to Rule 56.1 Statement.

ARGUMENT

As addressed below and further detailed in Defendant's Motion for Summary Judgment, there is no issue of fact that in any way supports Plaintiff's claim for breach of contract. There is no enforceable contract upon which to base a claim against Defendant and accordingly, the Complaint must be dismissed. Defendant addresses the deficiencies in the argument set forth by Plaintiff, even though in order to do so, Defendant must set aside the fact that the purported support provided by Plaintiff in support of summary judgment is of no moment and not applicable to the actual matters at issue. Plaintiff's Complaint must be dismissed, on the law, for a failure to comply with the law of the State of New York.

Simply put, Plaintiff's motion does not address the underlying legal issue that unequivocally supports dismissal of Plaintiff's claims. Instead, Plaintiff's motion bypasses the foregoing and raises issues that, even if in dispute, are not pertinent to the reasons supporting dismissal of Plaintiff's entire claim. However, Defendant believes it is compelled to address those allegations while highlighting that Plaintiff's entire motion is baseless.

The law in the Second Circuit is clear as detailed in Cherry v. Alderman, 08 CV 4035 (ENV)(LB), 2011 U.S. Dist. LEXIS 146468, *13-14 (E.D.N.Y. 2011). The District Court discussed the applicable law: "Summary judgment is proper only when, construing the evidence in the light most favorable to the non-movant, 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" Doninger v. Niehoff, 642 F.3d 334, 344 (2^{nd} Cir. 2011) (quoting Fed. R. Civ. P. 56(a)). A fact is material if it is one that "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). "An issue of fact is 'genuine' if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'"

McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 202 (2d Cir. 2007) (quoting Anderson, 477 U.S. at 248); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). "The trial court's function in deciding such a motion is not to weigh the evidence or resolve issues of fact, but to decide instead whether, after resolving all ambiguities and drawing all inferences in favor of the non-moving party, a rational juror could find in favor of that party." Pinto v. Allstate Ins. Co., 221 F.3d 394, 398 (2nd Cir. 2000); see also Baker v. Home Depot, 445 F.3d 541, 543 (2nd Cir. 2006) (resolving all ambiguities and drawing all inferences in favor of the non-moving party on summary judgment).

Here, addressing the arguments raised in Plaintiff's motion, it is clear that numerous questions of fact exist whether (assuming only for the sake of this argument an enforceable contract existed), Plaintiff performed, and Defendant already had a relationship with the eventual purchaser making Plaintiff's claim of an "introduction", at the very least, a question for the finder of fact.

Finally, the only truly undisputed facts are (1) New York law dictates that there was no enforceable and binding contract, and; (2) that Plaintiff did not perform a task by "introducing" Defendant to a business partner Defendant had known for years and continued to have a professional relationship with prior to meeting Plaintiff.

A) In Order to Sustain a Cause of Action for Breach of Contract a Plaintiff Must Prove That an Enforceable Contract Existed.

Plaintiff's entire motion relies upon a recitation of the elements of a breach of contract claim followed by a string cite of four cases that stand for the general elements involved. Notably, plaintiff fails to note, and completely ignores the legal necessity that an enforceable agreement is necessary to sustain a breach of contract claim, and fails to address that here, an enforceable contract never existed, as required under New York law. Bice v. Robb, 2013 U.S. App. LEXIS 3055, *2 (2nd Cir. 2013). "[A] plaintiff in a breach of contract case must prove [ ] that an enforceable contract existed..." Roberts v. Karimi, 251 F.3d 404, 407 (2nd Cir. 2001)[internal quotations omitted]; see also, Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y., 375 F.3d 168, 177 (2nd Cir. 2004). Any claim that fails "to allege facts sufficient to show that an enforceable contract existed" between the parties is subject to dismissal. Banco Espirito Santo de Investimento, S.A. v. Citibank, N.A., No. 03 Civ. 1537, 2003 U.S. Dist. LEXIS 23062, at *9-10 (S.D.N.Y. 2003). In the absence of a valid and enforceable agreement, a breach of contract claim must be dismissed. Merrick Gables Ass'n v. Town of Hempstead, 691 F. Supp. 2d 355, 363 (E.D.N.Y. 2010). (Defendant's Rule 56.1 Counterstatement Statement at ¶ 51).

In Merrick, the Plaintiffs failed to show the existence of a valid contract and the claim was dismissed. Id. The District Court noted that even if there had been a written agreement, it would be unenforceable because the terms "would run afoul of" the law applicable to entering into the agreement. Id. "Moreover, even if the Plaintiffs had alleged an oral agreement, N.Y. Town Law § 64(6) requires all contracts entered into by a town to be executed by the town supervisor and approved by the town board. N.Y. Town Law § 64(6). Here, there is no indication that the alleged agreement was ever approved by the Hempstead supervisor or ratified by the Hempstead Board." Id. Just as in Merrick, the Plaintiff here cannot "run afoul" of the applicable laws and allege an enforceable contract. Because PrinceRidge must be licensed to facilitate the purchase and sale of real property, and Plaintiff does not dispute it was not licensed, Plaintiff's claim for breach of contract must be dismissed. Plaintiff was not licensed, therefore there was no enforceable contract, and, as the law dictates, the breach of contract claim must be dismissed.

A non-licensed broker is barred from recovery for breach of contract pursuant to Real Property Law § 442-d. Futersak v. Perl, 84 A.D.3d 1309, 1311, 923 N.Y.S.2d 728, 730, 2011 NY Slip Op 4629, *4-5 (2nd Dept. 2011). Plaintiff characterizes its alleged role in the real estate sales as merely a "finder" and not a broker and relies on cases involving corporate mergers and loans to support their argument instead of addressing the well-settled law that addresses Plaintiff's services in connection with real property. Plaintiff ignores the fact that the purchase and sale of real estate in New York is governed by the New York State Real Property Law and unconditionally prohibits those without a license from engaging in a transaction for the purchase and sale of real property. Instead, Plaintiff's motion relies in part upon the definition provided by Merriam-Webster Dictionary (Plaintiff's Memorandum, page 11), to distinguish Plaintiff's role as a non-licensed broker.

However, the Courts of New York have addressed this issue and the cases do not rely upon Webster's definition. (Defendant's Rule 56.1 Counterstatement Statement at ¶ 50). Where a party cannot "demonstrate, that the underlying transaction was anything more than the purchase and sale of real property, or that the services rendered were for any purpose other than facilitating that purchase and sale" the claim must be dismissed pursuant to Real Property Law § 442-d **even where the collection of the fee was labeled a "finder's fee"**. Futersak v. Perl, 84 A.D.3d 1309, 1311, 923 N.Y.S.2d 728, 730, 2011 NY Slip Op 4629, *4-5 (2nd Dept. 2011)[emphasis added]. Real Property Law § 442-d provides that "[n]o person . . . shall bring or maintain an action in any court of this state for the recovery of compensation for services rendered . . . in the buying, selling, exchanging, leasing, renting or negotiating a loan upon any real estate without alleging and proving that such person was a duly licensed real estate broker or real estate salesman on the date when the cause of action arose." Contrary to the Supreme Court's conclusion, this prohibition applies even if the services rendered are characterized as those of a "finder". Id.; (Defendant's Rule 56.1 Counterstatement Statement at ¶¶ 49, 51, 52). The New York Legislature and the various New York Courts have spoken on this issue and it is unanimous that a plaintiff such as PrinceRidge may not maintain an action in New York for the recovery of compensation for the services rendered in the case at bar.

Plaintiff's motion does not address the applicable law. Plaintiff relies primarily upon Northeast Gen. Corp. v. Wellington Advertising, a case that involved a plaintiff seeking to recover a finder's fee for the sale of stock and a subsequent merger agreement between two companies. Northeast Gen. Corp. v. Wellington Advertising, 82 N.Y.2d 158, 165 (N.Y. 1993). The central question in Northeast Gen. Corp. was whether the agreement between the parties created a relationship of trust between them producing a fiduciary-like obligation on the finder. Northeast Gen. Corp. v. Wellington Advertising, 82 N.Y.2d 158 at 165. Northeast Gen. Corp., like all of the cases Plaintiff cites, does not apply to this action as New York has a specific statute (Real Property Law § 442-d) as well as an abundance of case law completely on point, that addresses the facts at bar. All of the cases Plaintiff relies on to draw a distinction between sellers and brokers do not involve real estate transactions. The issue in Northeast Gen. Corp. – whether to extend the fiduciary duties of a broker of a corporate merger to that of the plaintiff-finder – is completely inapplicable to the case at bar. Unlike real estate sales, such as the transaction *sub judice*, Northeast Gen. Corp. involved the sale of stock and a subsequent merger agreement between two companies.

Likewise Plaintiff's reliance on Train v. Ardshiel Associates, Inc. is completely misplaced. Train v. Ardshiel Associates, Inc., 635 F. Supp. 274 (S.D.N.Y. 1986). Train involved an alleged oral agreement by a finder to assist in the acquisition of one corporation by another. Train v. Ardshiel Associates, Inc., 635 F. Supp. at 275-76. Similarly, Minichiello v. Royal Business Funds Corp., cited to support the proposition that a finder need "make only two phone calls" to earn his commission, also does not involve a real estate transaction. Minichiello v. Royal Business Funds Corp., 18 N.Y.2d 521, 524 (N.Y. 1966). Minichiello addresses that plaintiff's alleged role in finding a purchaser for "a substantial amount of the convertible debentures" and certain stock. Minichiello v. Royal Business Funds Corp., 18 N.Y.2d at 524.

Finally, Plaintiff cites Polo v. Lordi to suggest that a broker is required to act as "an intermediary between two parties in bringing about a contractual meeting of the minds." Polo v. Lordi, 261 N.Y. 221, 223-24 (N.Y. 1933). Polo, involved a real estate broker, but not a real estate transaction. Polo v. Lordi, 261 N.Y. at 223-24. The plaintiff-real estate broker in Polo, was instead employed to procure a loan for the defendant corporation. Id. The Polo Court addressed that "[t]here [was] nothing to show that the plaintiff acted as an intermediary or broker between the parties." Id. at 224.

Plaintiff attempts to characterize its role as merely a "finder" and not that of a "broker". Plaintiff inappropriately relies upon inapplicable case law involving corporate mergers, stock transactions and loans, and does not address real estate transactions. Even if Plaintiff was able to show – which is belied by the record – that Plaintiff provided some service other than arranging a real estate purchase and sale, New York Courts stress that despite the existence of factors other than the real property, "since the dominant feature of the sale under review was its real estate, and since [the individual seeking compensation] was not a licensed real estate broker, he was not entitled to recover a fee for his services." Panarello v. Vinchiarello, 6 A.D.3d 515, 516-517, 775 N.Y.S.2d 360, 361-362 (2nd Dept. 2004) ["[T]he dominant feature of the transaction under review was not the sale of a Country Club business, but rather the transfer of valuable real estate." The real estate was the primary asset involved in this transaction.]. Here, there is no fact, let alone a disputed question of fact, that suggests anything other than the dominant/only feature of this transaction was the sale of real property. In his deposition testimony Mr. Ryan was very clear – selling the property was the only option. He stated that "[Oppidan's] goal was to sell [the property] and that was our focus." (Defendant's Rule 56.1 Counterstatement Statement at ¶ 5). Although they may have "talked about other options" at the meeting, because "[Oppidan] were merchant developers [. . .] sale was it". (Defendant's Rule 56.1 Counterstatement Statement at ¶ 5). If there were any ambiguity, it was clarified on the next page of his deposition when Mr. Ryan described his company. "[Oppidan] build[s], buy[s] and sell[s]" and that it is all "pretty basic". (Defendant's Rule 56.1 Counterstatement Statement at ¶ 5). Oppidan's "goal was to source buyers and that [PrinceRidge] were going to represent us and broker these deals to buyers that we couldn't access." (Defendant's Rule 56.1 Counterstatement Statement at ¶ 5). Mr. Kirsch also confirmed that PrinceRidge agreed that its engagement letter confirms the "only service [. . .] to [be] provide[d] [was] as an exclusive advisor [ ]in connection with the sale of the [Portfolio]." (Defendant's Rule 56.1 Counterstatement Statement at ¶ 6).

As previously discussed at length in Defendant's motion for summary judgment, and referenced here for sake of brevity, the Southern District follows the New York cases on point. In American Property Consultants, Ltd. V. Walden Lisle Associates LP, 95 Civ. 329 (KMW), 1997 U.S. Dist. LEXIS 9984 (S.D.N.Y. 1997), the District Court held that:

> ...introducing a potential buyer to a seller and assisting that buyer in consummating the sale, are those that have traditionally been defined as brokerage services and constitute the services of a "real estate broker" as defined by New York RPL § 440. NFS Servs., Inc. v. West 73rd St. Assoc., 102 A.D.2d 388, 477 N.Y.S.2d 135 (1st Dep't 1984) (procuring purchaser is within the scope of § 442-d), aff'd, 488 N.Y.S.2d 648 (1985). Therefore, under RPL § 442-d, plaintiff would be required to allege and prove that it was a duly licensed real estate broker or salesman at the time when the action arose or when it provided the services for which it seeks compensation. Bendell, 251 N.Y. at 308-09. Plaintiff has not alleged, nor can it allege, that it was licensed at the time the action arose, and is thus barred from bringing a suit for the payment of a commission. See, e.g., NFS Servs., [supra]."

American Prop. at 21-23.

Just as directed in American Property Consultants, Ltd., above, Plaintiff has not alleged, nor can it allege, that it was licensed at the time the action arose, and is thus barred from bringing a suit for the payment of a commission, no matter how Plaintiff chooses to define commission. In addition, Mr. Kirsch advised Oppidan on how to respond to bids and advised . Oppidan as to "how [it] should counter". (Defendant's Rule 56.1 Counterstatement Statement at ¶ 18 and ¶ 15).

The purchase and sale of real property in New York is explicitly governed by the Real Property Law. The Real Property Law provides its own definition of a broker and requires that all real estate brokers be licensed. The New York Legislature specifically prohibits Plaintiff's unlicensed actions and the case law is undisputed that the actions taken by a non-licensed broker do not permit recovery. Accordingly, because a non-licensed broker cannot contract to engage in the purchase and sale of real property, there is no enforceable contract that could have been breached and Plaintiff's complaint must be dismissed. It is axiomatic that because Plaintiff does not have a viable cause of action for breach of contact the instant motion for summary judgment must be denied.

B) In Order to Sustain a Cause of Action for Breach of Contract a Plaintiff Must Prove That It Performed What It was Obligated to do Under the Terms of the Contract.

Plaintiff uses over a dozen pages attempting to re-craft the facts underlying this matter. Plaintiff spends significant portions of the motion attempting to establish the hard work Plaintiff undertook to introduce Defendant with the eventual purchaser of the Properties. Within the same motion papers, Plaintiff admits it is aware of the "pre-existing relationship [Oppidan had] with NRP", but calls it "immaterial." (Plaintiff's Memorandum, p. 14, fn 6). The natural question then becomes whether Plaintiff performed under the terms of its agreement with Oppidan by "introducing" Oppidan to a purchaser that admittedly had a pre-existing relationship.

In addition, Plaintiff seeks summary judgment on the terms of the agreement, but Plaintiff's motion re-categorizes Plaintiff's obligations under the agreement from "introducing Oppidan to buyers" (as clearly set forth in the Contract), to "introducing buyers to the transaction." (Plaintiff's Memorandum, p. 6) (Tonorezos Declaration in Opposition, ¶4). It is respectfully suggested that Plaintiff recognizes that Oppidan could not be introduced to a pre-existing relation, and therefore circumvents that point by arguing that Plaintiff earned a commission by introducing buyers to the transaction. However, the terms of the letter are unambiguous as to those obligations and cannot be changed through motion practice.

i) Plaintiff acknowledges a pre-existing relationship between Oppidan and the eventual purchaser of the Properties.

"Under New York law, the elements of a breach of contract claim are the formation of an agreement, performance by one party, breach of the agreement by the other party, and damages." Berman v. Sugo LLC, 580 F. Supp. 2d 191, 202 (S.D.N.Y. 2008). "[A] plaintiff in a breach of contract case must prove not only that an enforceable contract existed, but also that he performed what he was obligated to do under the terms of the contract [and] was ready, willing and able to do all that the contract required." Roberts v. Karimi, 251 F.3d 404, 407 (2^{nd} Cir. 2001)[internal quotations omitted]. As noted above, there was no enforceable contract. In addition, Plaintiff's entire allegation of breach is premised upon the suggestion that Plaintiff performed under an agreement with Oppidan when Plaintiff introduced Oppidan into a pre-existing relationship. This argument is belied by common sense: Plaintiff could not have fulfilled its obligations under the agreement to introduce Defendant to an entity with which Defendant had a pre-existing relationship. Moreover, the agreement was for Plaintiff to find a buyer that Oppidan did not know. (Defendant's Rule 56.1 Counterstatement Statement at ¶¶ 38, 43).

By Plaintiff's own admission, PrinceRidge acknowledges the pre-existing relationship. (Plaintiff's Memorandum, p. 14, fn 6) (Defendant's Rule 56.1 Counterstatement Statement at ¶ 38). Plaintiff suggests that this undisputed fact is "immaterial". Plaintiff's only explanation why such a significant fact is immaterial is that the Letter of Intent (the Contract), which was drafted by PrinceRidge, did not contain "'carve-outs' for Oppidan's pre-existing relationships". (Plaintiff's Memorandum, p. 14, fn 6). However, any ambiguity in the drafting or potential reasons behind Plaintiff's failure to include "carve-outs", cannot weigh against Oppidan. It is a "... fundamental principle of contract law that 'ambiguities in a contractual instrument will be resolved *contra proferentem*, against the party who prepared or presented it.'" Fredericks v. Chemipal, Ltd., 06 Civ. 966 (GEL), 2007 U.S. Dist. LEXIS 49185 *3 (S.D.N.Y. 2007), citing, 151 West Associates v. Printsiples Fabric Corp., 61 N.Y.2d 732, 734, 460 N.E.2d 1344, 472 N.Y.S.2d 909 (1984). Moreover, PrinceRidge's draft did not provide any mutuality of drafting provision that could be deemed to infer any ambiguity or omission could weigh against Oppidan.

At a minimum, whether Plaintiff could have "introduced" Oppidan to an entity with which Oppidan had a pre-existing relationship is not a question that should be taken from the trier of fact. Although Defendants take a diametrically opposed position, that an introduction cannot be made to an individual or entity with whom an introduction is complete and relationship established, Plaintiff cannot be awarded summary judgment on this element of "performance" under the contract. Accordingly, Plaintiff's motion for summary judgment must be denied.

ii) PrinceRidge did not perform its obligations under the Contract.

In an apparent attempt to circumvent that no "introduction" could have occurred, Plaintiff's motion alters the terms of the contract. It is undisputed that the contract provides "… PrinceRidge shall … (ii) introduce the Company [Oppidan] to potential buyers of the Assets [16 Properties]…" (Tonorezos Declaration in Opposition, ¶4, Introduction and Retention ¶1(b)). In the motion for summary judgment, Plaintiff suggests that it met its obligations under the contract when it "introduced NRP to the Transaction". (Plaintiff's Memorandum, p. 6). Although the alteration is subtle, it completely changes the obligations PrinceRidge alleges it was obligated to perform, and by doing so, allows PrinceRidge to avoid addressing that it could not possibly be found to have introduced Oppidan to NRP. However, PrinceRidge cannot change the terms of the writing Plaintiff drafted is in evidence.

Moreover, the motion also mischaracterizes the specific activities taken by PrinceRidge. To establish the elements of its claim, Plaintiff writes that it "immediately commenced: 1) identifying entities interested in providing equity to a joint venture that might acquire the Properties; 2) identifying entities interested in providing loans to refinance the existing mortgages; 3) identifying entities interested in purchasing one or all of the Properties outright. (Plaintiff's Memorandum, p. 5). The motion cites Mr. Kirsch's testimony to support the foregoing. However, Mr. Kirsch's own testimony clarified that no services were provided other than to secure potential buyers. Mr. Kirsch confirmed that with this engagement PrinceRidge was to act as the exclusive advisor in connection with the sale of the 16 properties and that was all. (Defendant's Rule 56.1 Counterstatement Statement at ¶ 47). Oppidan did not pay PrinceRidge a commission because Plaintiff did not introduce Oppidan to NRP. (Defendant's Rule 56.1 Counterstatement Statement at ¶ 39). At deposition, it was confirmed that Oppidan's position is that PrinceRidge "didn't do their job" as they promised to "introduce [Oppidan] to new clients" which they did not do. (Defendant's Rule 56.1 Counterstatement Statement at ¶ 37).

Q: So the only service that PrinceRidge was to provide as an exclusive advisor was in connection with the sale of a 16-property portfolio?

A: Correct. ("M. Kirsch Dep."; at 102:18-22.)

(Defendant's Rule 56.1 Counterstatement Statement at ¶¶ 6, 14, 47).

While this testimony unconditionally supports that Plaintiff's Complaint must be dismissed as its only role was that of a broker, the testimony also evidences two differing accounts of what PrinceRidge alleges it set out to do and whether it performed its obligations under the contract. Accordingly, as Plaintiff cannot establish that it performed under the contract, Plaintiff's motion for summary judgment must be denied.

CONCLUSION

For the foregoing reasons, defendant respectfully requests that Plaintiff's Rule 56 motion be denied in its entirety and instead, that each of plaintiff's causes of action be dismissed; and that the Court grant such other and further relief as the Court deems just and proper.

Dated: New York, New York
April 8, 2013

Respectfully submitted,

WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER LLP

By: ______________________
Anastasios P. Tonorezos (AT-8709)
Jean Claude Mazzola (JM-4962)
150 East 42nd Street
New York, New York 10016-5639
(212) 490-3000
(212) 490-3038
Ernest.tonorezos@wilsonelser.com
File No. 12824.00002
Attorneys for Defendants